Supreme Court, U.S.
FILED

No. 93-1189

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),

Petitioner,

vs.

TOKIO FIRE & MARINE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CORPORATION; SHIN KONG FIRE & MARINE INSURANCE CO., LTD.; COMPASS INTERNATIONAL, JANKA, LTD.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC.; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an owner of damaged cargo elect not to sue his own Non-Vessel Operating Common Carrier (NVOCC), but sue instead the underlying vessel owner Hanjin and its vessel KOREAN WONIS ONE, invoking the terms of Hanjin's non-negotiable bill of lading on which the cargo owner was not named, and of which it was not a transferee?

2. If Hanjin is liable to cargo plaintiffs, may it nonetheless invoke a $500 per customary freight unit limitation of liability based on the terms of its bills of lading and Service Contracts with the NVOCCs?

3. Is it permitted for a ship-owning company to file an appeal in one name but two capacities, or is it necessary to assert the legal fiction that the inanimate vessel is itself a separate appellant?

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

Rule 29.1 Statement

Petitioner Hanjin Container Lines, Inc. is a corporation which has issued no shares in the United States, and is the owner of the vessel HANJIN YOSU formerly known as KOREAN WONIS ONE. There are no affiliates or subsidiaries of the petitioner.

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In The
SUPREME COURT OF THE UNITED STATES
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HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),
Petitioner,

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TOKIO FIRE & MARINE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CORPORATION; SHIN KONG FIRE & MARINE INSURANCE CO., LTD.; COMPASS INTERNATIONAL, JANKA, LTD.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC.; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Hanjin Container Lines, Inc. respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit issued in this proceeding on October 22, 1993.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 7 F.3d 1427 (9th Cir. 1993) and is printed here as Appendix A.

JURISDICTION

This is an action in admiralty under 28 U.S.C. § 1333(1) for damage to cargo brought before the Central District of California. Judgment was entered on March 23, 1992. Timely appeal was filed with the Ninth Circuit on April 21, 1992 within the 30 days provided by Fed.R.App.P. 4(a)(1). The decision of the Court of Appeals sustaining the District Court was filed on October 22, 1993. This petition is timely under the 90-day rule of Supreme Court Rule 20.4. The jurisdiction of the Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(a). The writ is sought under Supreme Court Rule 17.1(a) and (c).

STATUTES INVOLVED

46 U.S.C. Appx. § 1304(5), part of the Carriage of Goods by Sea Act; 46 U.S.C. Appx. § 1702(17), part of the Shipping Act of 1984; and 49 U.S.C. § 112, part of the Pomerene Bills of Lading Act are set out in Appendix B, and are also set out in the relevant parts of the Reasons below.

STATEMENT OF THE CASE

Defendant Hanjin Container Lines, Inc. (called "Hanjin" hereafter) is an ocean common carrier, and the owner of the Korean-flag vessel known as "KOREAN WONIS ONE."

In April 1988, prior to leaving drydock after repairs in Korea, a manhole cover to a ballast wat[illegible] tank in one hold of KOREAN WONIS ONE was left open by a dockyard worker. Later that night, the vessel loaded a cargo of containers in its hold and ballasted its tanks with seawater for the trans-Pacific voyage to California. Darkness prevented the vessel's officers from discovering the open manhole cover, and the ballast water flooded the hold, inundating about 40 containers, and damaging their cargo.

KOREAN WONIS ONE proceeded to Los Angeles, discharged its cargo, and petitioned to limit its liability under 46 U.S.C. § 183 *et seq.*, claiming that the amount of its liability would eventually be limited to the fund established by the law of the vessel's flag: Korean law set a limitation fund at $415,698. The vessel's value was about $1.32 million and claims for damage amounted in total to about $1.15 million.

The District Court denied the right to limit, and the Court of Appeals for the Ninth Circuit sustained the District Court, *In re Korea Shipping Corp., Ltd.*, 919 F.2d 601 (9th Cir. 1989). Certiorari was denied in 1991 at 499 U.S. 961 (1991), and this issue is no longer alive.

On remand, all previous claimants in limitation were permitted to file suit as plaintiffs, and Hanjin *in personam* and KOREAN WONIS ONE *in rem* became the defendants. Hanjin provided security in lieu of the arrest of the vessel, and appeared personally to defend itself

and also as claimant of its vessel (or more properly, as claimant of the *res*, which by then was the substituted financial security). The various plaintiffs' actions were consolidated for most purposes and trial was held in admiralty to the Court sitting without a jury.

"Due diligence" was segregated from all contractual and damage matters, and trial on due diligence was held on April 2, 1991 and thereafter. The District Court found that, although vessel's officers had confirmed that the manhole cover was indeed closed 12 hours before leaving drydock, they should have anticipated subsequent shipyard negligence, and should have checked the manhole cover again before loading cargo. The Court found that, on the facts, the shipowner through its officers had failed to exercise due diligence at and before the commencement of the voyage, which is the applicable legal standard under the Carriage of Goods by Sea Act, 46 U.S.C. Appx. § 1300 *et seq.* The Court required an unusual level of perfection but the factual findings were not clearly erroneous, and the finding was not appealed.

Thereafter, many of the cases settled, leaving only the present plaintiffs unsatisfied. These plaintiffs had sued Hanjin and its vessel directly. Plaintiffs had not contracted with Hanjin and were not holders in due course of any Hanjin bills of lading. Instead, plaintiffs had contracted with NVOCCs (or Non-Vessel-Operating Common Carriers, a new legal entity created by the Shipping Act of 1984) and plaintiffs held, as purchasers for value in due course, only NVOCC bills of lading. These plaintiffs had not sued their NVOCCs.

Hanjin had entered into Service Contracts with various NVOCCs pursuant to which it agreed to carry their containers, regardless of contents, at a lump sum rate (of about $1300 for a 20 foot long container).

Hanjin had issued *non-negotiable* (or "straight") bills of lading to each NVOCC, naming the NVOCC as the party entitled to delivery at destination. The NVOCCs in turn had issued their own, different, *negotiable* (or "order") bills of lading to the shippers. The shippers had sold these NVOCC bills of lading to the cargo plaintiffs for value.

Eschewing their NVOCC bills of lading, and deliberately *not* naming their NVOCCs as defendants, plaintiffs sued Hanjin directly, claiming the benefit of Hanjin's non-negotiable bills of lading. Plaintiffs however were unable to produce Hanjin's bills of lading, because they had never purchased them for value, and had not otherwise become "transferees."

Hanjin denied liability to plaintiffs, contending that, under the terms of the Shipping Act of 1984 which established NVOCCs, and under all applicable case law, plaintiffs, as holders of NVOCC bills of lading, only had rights against their NVOCCs.

Hanjin also argued that because freight on its bills of lading was calculated on a lump sum basis (generally about $1300) per container pursuant to its Service Contracts with the NVOCCs, Hanjin's liability was limited to $500 per "customary freight unit" or container, pursuant to 46 U.S.C. Appx. § 1304(5).

Trial on these issues was held on February 11, 1992. The District Court, sitting without a jury, made no findings of fact or conclusions of law but entered a joint and several judgment for plaintiffs on March 23, 1992 against Hanjin and its vessel for the full amount of damages.

Timely appeal was brought.

The issue of Hanjin's direct liability to cargo owners where intermediate, but unsued, NVOCCs existed, had

not previously been addressed by the Ninth Circuit, and this was an issue of first impression. Hanjin, however, contended that *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294 (1st Cir. 1974) held that Hanjin could not be liable *in personam* directly to cargo plaintiffs, and that *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir. 1984) held that KOREAN WONIS ONE (or Hanjin, as its claimant *in rem*) could not be liable *in rem* directly to cargo plaintiffs.

The Ninth Circuit sustained the District Court, holding that plaintiffs were "actual parties" to Hanjin's bills of lading because Hanjin's bill of lading definition of "Merchant" could be read to include the ultimate "owner and receiver of the Goods." The Circuit Court did not address the distinction between negotiable and non-negotiable bills of lading. The Circuit Court then found that the language of Hanjin's bill of lading limiting its liability to the "customary freight unit" was unenforceable. Hanjin was thus contractually obligated to unintended third-party beneficiaries by the terms of its bill of lading, but could not itself enforce its contract terms against the beneficiaries! The Ninth Circuit's opinion is in conflict with the opinions of the First and Second Circuits above.

Finally, after oral argument, the Court of Appeals raised *sua sponte* the *Torres*[1] issue whether KOREAN WONIS ONE was party to the appeal. After supplemental briefing but without hearing argument, the Court concluded "Although Hanjin, Inc.,[2] reminds us that it is

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[1] *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

[2] This is an error, the correct name being Hanjin Container Lines, Inc.

the claimant of the vessel and that it has coterminous liability with the vessel, it is not identical to the vessel and we decline to hold that a claimant and a vessel are one [and] the same for purposes [of] naming the proper parties to an appeal." The Court therefore declined to decide the *in rem* issues on the grounds that the vessel had not appealed them. This is a technical, but catastrophically misleading, legal mistake: a vessel, as an inanimate object, is susceptible of arrest but cannot itself appear. It appears *only* through its claimant, Hanjin.

REASONS FOR GRANTING THE WRIT

1. In Allowing Cargo Plaintiffs To Eschew Suit Against Their Own Non-Vessel-Operating Common Carrier And To Sue The Underlying Carrier And His Vessel Directly, The Ninth Circuit Is In Irreconcilable Conflict With The First, Second And Third Circuits As To A Matter On Which National Uniformity Is Essential.

Plaintiffs' shippers delivered their cargoes to various Non-Vessel-Operating Common Carriers, and received clean *negotiable* bills of lading. Plaintiffs purchased these bills of lading for value, and became holders in due course, with all the rights the law conveys to *bona fide* purchasers for value of negotiable commercial paper.

Eschewing their negotiable bills of lading, plaintiffs sued Hanjin and its vessel on Hanjin's *non-negotiable* bills of lading. Hanjin defended on the basis that plaintiffs are limited to suit against their NVOCCs, and also on the basis that plaintiffs were not transferees of Hanjin's non-negotiable bills of lading under 49 U.S.C.

§ 112, and had no rights thereunder. The District Court found for plaintiffs, but did not explain the theory of direct liability. The Ninth Circuit affirmed the District Court in a written opinion.

In reaching its conclusion, the Ninth Circuit recognized the existence of NVOCCs in this case and their legal status, but declined to apply the status to the facts or to address those salient decisions (from the First, Second and Third Circuits) that are opposed to the Ninth Circuit's rule of law. As a result there is a conflict between Circuits on a fundamental point of maritime cargo law, and which is aggravated by the decision of the Ninth Circuit not to address the contrary cases.

The statutory status of the NVOCC is crucial to this case. It is a deliberately created hybrid, a shipper with respect to the vessel owner, and a common carrier authorized to issue bills of lading with respect to the cargo owner.

The Non-Vessel-Operating Common Carrier was created in its present form by and is defined in the Shipping Act of 1984 as a "common carrier that does not operate the vessels by which ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. Appx. § 1702(17).

A Non-Vessel-Operating Common Carrier is defined in Federal Maritime Commission decisions and regulations as:

> "a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act, 1916;

> assumes responsibility or **has liability imposed upon it by law for the safe water transportation of the shipments** and arranges in his own name with underlying water carriers for the performance of such transportation."

46 C.F.R. § 510.21(d); *Ship's Overseas Service, Inc. v. Federal Maritime Commission*, 670 F.2d 304, 307 (D.C. Cir. 1981) citing Determination of Common Carriers Status, 6 F.M.B. 245, 256-57 (1961). (Emphasis added.)

> ". . . (T)he important point about an NVOCC is that although it may not own the ships on which its customers' goods are physically transported, it nevertheless is the 'carrier' responsible for the through transportation of such goods, including the water portion."

Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294, 1295 (1st Cir. 1974); see also *Federal Insurance Co. v. Transconex, Inc.*, 430 F. Supp. 290, 294-95 (D.P.R. 1976); *Hanover Insurance Co. v. Shulman Transport Enterprises, Inc.*, 581 F.2d 268 (1st Cir. 1978).

All other courts which have considered the issue, with the exception of the Ninth Circuit, agree that the NVOCC is the primary bill of lading carrier for the purposes of litigation by the injured cargo owner. *SPM Corp. v. MING MOON*, 965 F.2d 1297 (3d Cir. 1992); *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299, 301 (2d Cir. 1984); *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294, 1295 (1st Cir. 1974); *Modern Office System v. AIM Caribbean Exp.*, 802 F. Supp. 617 (D.P.R. 1992); *Ultimo Cabinet*

Corp. v. M/V MASON LYKES, offic. unrep., 1991 AMC 1343 (S.D.N.Y. 1991); *M. Prusman Ltd. v. M/V NATHANAEL*, 670 F. Supp. 1141, 1143 (S.D.N.Y. 1987); *Halm Industries Co. Inc. v. S/S TIMUR STAR*, offic. unrep., 1985 AMC 391 (S.D.N.Y. 1984).

In this respect, the Ninth Circuit is in direct conflict with uniform decisions of the other circuits, which have held that an injured cargo owner may not sue the underlying vessel owner or his vessel directly, but may only sue his own ocean carrier, the NVOCC. In *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294, 1295 (1st Cir. 1974) the First Circuit held that, as a matter of law, the goods were shipped by the shipper and his assignees under the NVOCC bill of lading, and the shipper was bound by the terms of that bill of lading, and could not sue under the ocean carrier's.

In *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir. 1984) the Second Circuit held that the vessel did not ratify the NVOCC's bill of lading and so did not become liable *in rem* to the NVOCC's shipper. Building on this, in *Ultimo Cabinet Corp. v. M/V MASON LYKES*, offic. unrep., 1991 AMC 1343 (S.D.N.Y. 1991) it was held that the holder of an NVOCC bill of lading had rights to sue the NVOCC, but had no legal ability to sue the ocean carrier or its vessel.

A slightly different rule may exist in the Third Circuit as a result of *SPM Corp. v. MING MOON*, 965 F.2d 1297 (3d Cir. 1992).[3] In that circuit, it is still clear that the NVOCC is the cargo owner's primary defendant, and

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[3] This case was addressed at oral argument, having come down after the briefing. It was not addressed in the Ninth Circuit's opinion.

the NVOCC contract is the primary contract of carriage, but it also appears that if the NVOCC is found to be the cargo shipper's agent, the cargo owner's rights will be further constrained by any extra terms of the ocean carrier's bill of lading.

Despite these cases, and despite acknowledging the statutory definition and role of the NVOCC, the Ninth Circuit Court of Appeals has concluded that injured cargo owners may eschew suit on their negotiable bills against their NVOCCs, and instead may sue the vessel owner and his vessel directly.

The mechanism used by the Ninth Circuit was to overlook the status of Hanjin's bill of lading as a non-negotiable document, interpreting the definitional term "Merchant" within the bill of lading to extend to plaintiffs, thereby finding, in effect but without explicitly so stating, that plaintiffs were "unnamed but intended third-party beneficiaries" of Hanjin's bill of lading. This was a conclusion of law, since it was contradicted by unopposed testimony from Hanjin that its shipping contract and freight engagement was solely with the shipper and consignee on its non-negotiable bills of lading.

In so deciding, the Circuit also ignored Hanjin's legal argument that a straight bill of lading is a contract only between the parties named on it, unless one of the parties transfers it to a third party and the ocean carrier is so notified in writing. This traditional bill of lading law was statutorily encapsulated in the Pomerene Bills of Lading Act at 49 U.S.C. § 112.[4] The Pomerene Act is

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[4] Although the Pomerene Act by its terms applies to exports, but does not address imports, the Ninth Circuit in *Portland Fish Co. v. States Steamship Co.*, 570 F.2d 628, 631-33 (9th Cir. 1974) and the Eleventh Circuit in *U.S. v. Castro*, 829 F.2d 1038, 1050 (11th Cir. 1987) have held that it applies to imports too.

explicit that the only way a third party can acquire the benefits of a non-negotiable bill of lading is to become the *bona fide* transferee *and* to "notify the carrier of the transfer." 49 U.S.C. § 112. It is undisputed that this did not happen as respects any plaintiff. The non-negotiable Hanjin bills were never transferred to them, and so no notice was possible. This statutory obstacle was surmounted by the Circuit finding plaintiffs' "acceptance of the terms of Hanjin's bills of lading" was accomplished "by filing suit"! Should certiorari be granted, there will be a subsidiary issue respecting the relative merits of negotiable and non-negotiable documents that will be inherent in the basic discussion.

The Ninth Circuit's approach greatly increases complexity and uncertainty in an area of law where predictability is essential. For many years, public policy has given specially protected status to *bona fide* purchasers for value of *negotiable* commercial paper, such as negotiable bills of lading. Cargo plaintiffs here benefit from a series of legal presumptions in any litigation against the NVOCCs who issued negotiable bills of lading: for example, a "clean" negotiable bill of lading estops the NVOCC from claiming visible pre-shipment injury existed. These were deliberately conferred benefits (today primarily encapsulated in COGSA and the UCC) designed to enhance the reliability of transfers of negotiable commercial paper, and to enhance commerce. They are well understood, internationally accepted, and rapidly enforced. *Using these presumptions, cargo plaintiffs could, and should, have sued their NVOCCs directly, and would certainly have recovered their damages in full years ago.*

By allowing cargo plaintiffs to traverse their negotiable bills of lading and to sue as unintended third-party beneficiaries of Hanjin's non-negotiable bills,

unnecessary litigation has been sponsored, with uncertain limits that can only be resolved by further litigation. Can Hanjin invoke future NVOCC bills defensively if they are advantageous? Can plaintiffs elect which bill to adopt? If the bills are contradictory, is each contradictory clause void? Is a suit to reform one bill to the other appropriate or essential? These questions inescapably must arise if the Ninth Circuit's new litigation privilege is allowed to stand.

Despite the Ninth Circuit's approach in confounding rights under negotiable and non-negotiable documents and, in the process, omitting to discuss the First, Second and Third Circuit cases respecting NVOCCs, there is an unavoidable conflict between the actual holdings of rulings of the First, Second and Third Circuits and the Ninth Circuit.

The Ninth Circuit has ruled that cargo plaintiffs may eschew their NVOCCs and sue the ocean carrier and his vessel directly on the ocean carrier's bill of lading. The First and Second Circuits hold diametrically to the opposite, and have been joined by the Third Circuit, which allows use of the ocean carrier's bill of lading to limit liability where the NVOCC is also found to be the cargo owner's agent. The Ninth Circuit's view is irreconcilable with that of the other three circuits on a point of admiralty law as to which national uniformity is traditionally controlled by this Court.

It will be impossible for maritime practitioners to address the liabilities of vessels and vessel owners in an NVOCC context without addressing the conflict. The Second Circuit's opinions carry unusual weight in admiralty cases due to the volume of litigation in the Districts of New York. However, the next most prominent maritime circuit is now the Ninth, and their opinions in

this instance are wholly opposed. This is a recipe for chaos.

The ocean carriage of goods by containers is the primary method today of moving cargo, and maritime litigation in the federal courts is overwhelmingly container-oriented. The use of NVOCCs is extremely widespread, and the decision of the Ninth Circuit on this point will only create confusion where none has previously existed.

It is not possible to evade the effects of the Ninth Circuit's opinion by modifying the terms of international bills of lading. They are not uniform in any degree, and address multifarious situations; indeed any potential modification to elide the Ninth Circuit's opinion is likely to create a problem in another jurisdiction inasmuch as no other nation has invented a non-vessel-operating common carrier.

The problem is not really susceptible of external resolution because the conflict is domestic. The underlying problem is that the Ninth Circuit's opinion on the effect of American practice under COGSA and the Shipping Act is wholly incompatible with the opinions of the First, Second and Third Circuits. Confusion will be generated in an important and active commercial area until the conflict is resolved by this Court.

2. Hanjin's Liability To Its NVOCC Of $500 Per Customary Freight Unit Should Be Enforced Against Cargo Plaintiffs.

Limitation of liability is a jugular issue in maritime cargo litigation. There are two obvious forms — the vessel limitation under 46 U.S.C. § 183 (which was

earlier denied in this case) and the unit limitation under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).

The Carriage of Goods by Sea Act contains an explicit limitation of liability:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or **in case of goods not shipped in packages**, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . ." (Emphasis added.)

It is important to note that the statute creates two limitations:

1) the "package" limitation, and
2) for "goods not shipped in packages" the "customary freight unit" limitation.

The NVOCC accepts packages, and is therefore liable under the COGSA provision for $500 per package, and can arrange insurance to that effect and incorporate these costs in his freight charge. The NVOCC "stuffs" the packages into a container, seals it and delivers the container to the ocean carrier. The NVOCC and ocean carrier have a "Service Contract" requiring the ocean carrier to charge a unit or lump sum freight rate for each unit container. The NVOCC "ships" a container onboard Hanjin's vessel pursuant to the Service Contract.

As between the shipper and the NVOCC, the shipper shipped packages. As between the NVOCC and Hanjin, the NVOCC shipped a container, and it is generally accepted that, absent unusual facts, a 20- or 40-foot long ocean container is not a package. The NVOCC ships a container, which is not a package, and so is an instance of "goods not shipped in packages." The container becomes the "customary freight unit" as between ocean carrier and NVOCC, and this is borne out in fact by the freight terms of the Service Contract. The ocean carrier's liability to the NVOCC is $500 per customary freight unit, or container.

Such an analysis is entirely appropriate to the equities. It is appropriate because, between shipper and NVOCC, each can be insured for his own risks in proportion to the value of the cargo shipped, resulting in the cheapest insurance rates, and encouraging full disclosure. The shipper's claim is against his Non-Vessel-Operating Common Carrier. Therefore privity, notice of limitation, opportunity to declare higher value, increase in freight rates to reflect the higher value and increased liability, can all be clearly analyzed and expressed in the relationship between shipper and NVOCC. However, as between NVOCC and ocean carrier they have agreed to ship only containers, and only at pre-determined rates of freight, so that the customary freight unit would be the primary unit of liability. The NVOCC, by statutory definition a common carrier, is fully aware of the applicable limitation of value and of the effect of selecting the container as its customary freight unit, and so is not surprised or prejudiced by the statutory limit of $500 per customary freight unit.

The analysis was expressly used in *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir. 1984) to explain why

public policy required a shipper to sue his NVOCC only, and why public policy did not give him rights to sue the vessel or shipowner on which the NVOCC's consolidated container was carried. The Court explained that the shipowner carrying a container of consolidated goods would have no knowledge of the identity or value of the cargo so as to arrange protective insurance if he was directly liable to the NVOCC's shipper. It was necessary, for the protection of the ocean shipping trade, to filter the ocean carrier's liability through the NVOCC who knew the nature and value of the goods.

The Ninth Circuit's opinion conflicts with this analysis. In finding that the NVOCC's customer shipped packages, and that Hanjin is directly liable to the NVOCC's customer, the Circuit Court held that Hanjin's bill of lading language and Service Contract agreements *with the NVOCC* attempting to limit its liability to the customary freight unit were null and void *as to the customer* under the provision of COGSA forbidding attempts to lessen statutory liability: 46 U.S.C. Appx. § 1303(8).

The Ninth Circuit's reasoning is only valid if its premise is valid — that the cargo owner plaintiffs here may eschew their own NVOCC contracts and may sue Hanjin directly. If plaintiffs sue derivatively, being subrogated to their NVOCC's rights and agreements, Hanjin's maximum liability should be $500 per container customary freight unit.

An opinion from this Court that would, even partially, elucidate the package and unit limitation as it applies to containers and NVOCCs would greatly assist practicing admiralty lawyers in an issue that bedevils their daily practice.

The two commercial questions for which certiorari is sought are factually clear-cut and address current, active

and burning questions in maritime commercial law. The issues are fully presented, and ripe for determination. Maritime commerce is still the primary means by which the United States imports and exports goods. The Court would be performing a widely welcomed service by resolving and explaining the appropriate legal standards to be applied as to initial liability and as to limitation of liability thereafter where NVOCCs are involved.

3. Hanjin Is A Single Entity Which Appealed In Two Capacities, As A Defendant And As A Claimant Of A *Res.*

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) this Court held that Fed.R.App.P. 3(c) required that the name of the party-appellant be set out with specificity in the notice of appeal: "The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal." 487 U.S. at 318. The notice of appeal herein to the Ninth Circuit stated "COME NOW Hanjin Container Lines, Ltd. and Korea Shipping Corporation and appeal . . ." The vessel was not directly named, and the reason for this omission lies within admiralty procedural law.

Plaintiffs sued the inanimate vessel HANJIN YOSU *in rem*, and the vessel's corporate owner, Hanjin Container Lines *in personam*, in a single lawsuit for a single error, the wetting of cargo onboard the vessel. Hanjin provided security in lieu of the arrest of the vessel, and appeared personally to defend itself, and also as claimant of its vessel (or actually of the *res*, which was then the substituted financial security).

It is traditional law and the correct procedure that a claimant to a vessel assumes the position of defendant as

respects the complaint, and itself answers the complaint. *The TWO MARYS*, 12 F. 152 (S.D.N.Y. 1882); *accord, J.K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332, 334 (S.D.N.Y. 1931) ("The claimant is really an actor in the litigation . . .").

Where, as here, a stipulation for value is issued, it takes the place of the vessel and the lien is transferred from the vessel to the fund: *The OREGON*, 158 U.S. 186, 208 (1895); *Overstreet v. NORKONG*, 706 F.2d 641, 643 n.2 (5th Cir. 1983).

Hanjin appeared in the lawsuit in two capacities — as the *in personam* defendant and as a claimant to the *res* (which was a fund, *not* a vessel). These liabilities were coterminous, but for convenience, Hanjin's *res* was (incorrectly) thereafter and to date identified as "KOREAN WONIS ONE."

Thereafter, a single order of judgment was entered in favor of plaintiffs and against defendant *in rem* and *in personam*. Hanjin filed a timely notice of appeal, identifying itself by name as the appellant.

The Ninth Circuit has now held that "Although Hanjin Container Lines, Inc., reminds us that it is the claimant of the vessel and that it has coterminous liability with the vessel, it is not identical to the vessel and we decline to hold that a claimant and the vessel are one [and] the same for purposes [of] naming the proper parties to the appeal."

This is an erroneous statement of law in admiralty, and will certainly seriously disrupt a well-recognized set of procedures. At all times in admiralty the claimant and the vessel (or *res*) are one and the same. It is also in conflict with analogous decisions from the Fifth and Tenth Circuits holding that, under *Torres*, a single person having dual capacities is not required to identify

the capacities in which he is acting in the notice of appeal.

Hanjin Container Lines contends that it is appealing in two capacities — as defendant, and as claimant of HANJIN YOSU's security fund, and that it did not need to specify the distinct capacities. The Ninth Circuit instead has resurrected the legal fiction of the vessel as an independent entity subject to independent liability separate from that of its owner, and has found that the vessel did not appeal. This is a mechanistic approach, and outdated.

This Court has, on several occasions, warned lower courts that insistence upon the legal fiction that a vessel has a separate existence and a separate set of liabilities will create error:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated . . . . Certain parts of his property may become solely and exclusively liable for certain demands . . . and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability that a discharge or pardon extended to him will operate as a release of his property."

The CITY OF NORWICH, 118 U.S. 468, 503-04 (1885).

The Ninth Circuit in 1993 is talking in the very riddles denounced in 1885: a discharge of Hanjin *in personam* must, under the circumstances of this case, operate as a discharge of Hanjin's *in rem* liability too.

In *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), the Court warned that it was error to consider that a single joint suit, *in rem* against a vessel and *in personam* against the owner, could really involve two separate defendants with separate interests. The Court there invoked *The CITY OF NORWICH* with approval, as well as the rule of *Consumers Import Co. v. KKK Zosenjo*, 320 U.S. 249, 254 (1943), that "[t]here could be no practical exoneration of the owner that did not at the same time exempt his property."

In light of these strictures, the Ninth Circuit's decision is in error. (Indeed, in strict legality, KOREAN WONIS ONE was never a defendant or appellant: its place had been wholly taken by the security fund which should have been, had the Ninth Circuit pursued its view to its logical ends, the separately named appellant.)

As an additional ground for certiorari, case law from the Fifth and Tenth Circuits has explained *Torres* in a fashion that is directly applicable to the instant case, and in conflict with the Ninth Circuit's views. In *King v. Otasco Inc.*, 861 F.2d 438 (5th Cir. 1988), a father, suing in both his individual capacity and as next friend of his minor children, failed to name his children in the notice of appeal. The Court found that King's children were not independent parties, so that the issue was not "the omission of a party from a notice of appeal, but only a party's failure to designate all of the ***capacities*** in which he brought suit." *Id.* at 443 (emphasis in original). After raising the *Torres* issue *sua sponte*, the Tenth Circuit in *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) held that a mother's appeal was valid when

she had several capacities but did not name herself specifically as parent and guardian of her two sons. The Tenth Circuit expressly adopted *Otasco* for its analysis that *Torres* applies to require naming of independent parties but not to require the naming of related parties when they have common interests and appear by a single legal representative. A similar question was raised in *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990), and similarly resolved in favor of appeal by a single entity in multiple capacities.

The Ninth Circuit's application of *Torres* to a joint action *in rem* and *in personam* where the liability of the personal defendant and claimant to the *res*, Hanjin, is coterminous and interdependent strains the logic of the law, misunderstands admiralty procedure, conflicts with prior admiralty rulings of this Court and conflicts with other circuits which have ruled that *Torres* does not invalidate an appeal by one entity having several legal capacities.

The Ninth Circuit's opinion, in stating that a claimant and a vessel are not one and the same, is erroneous and can be guaranteed in due course to sow confusion and to reap discord.

CONCLUSION

The Court is requested to grant this petition for certiorari because the Ninth Circuit's decision as to bill of lading liability of Hanjin is in conflict with decisions of the First, Second and Third Circuits, while the Ninth Circuit's decision on the *Torres* question conflicts with admiralty opinions of this Court, and with analogous opinions of the Fifth and Tenth Circuits.

DATED: January 19, 1994.

Respectfully submitted,

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HANJIN CONTAINER LINES, INC. and
M/V KOREAN WONIS ONE

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALL PACIFIC TRADING, INC., a corporation,
Plaintiff,

and

TOKIO FIRE & MARINE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CORPORATION; SHIN KONG FIRE & MARINE INSURANCE CO., LTD.; COMPASS INTERNATIONAL, JANKA, LTD.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC.; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARD INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,
Plaintiffs-Appellees,

v.

VESSEL M/V HANJIN YOSU; CRYSTAL SHIPPING LINE,
Defendants,

HANJIN CONTAINER LINE, INC.; KOREA SHIPPING CORPORATION,
Defendants-Appellants.

No. 92-55550

D.C. No. CV-89-4911 JLH

OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
August 2, 1993—Pasadena, California

Filed October 22, 1993

Before: James R. Browning, Jerome Farris and Paul J. Kelly, Jr.*, Circuit Judges.

Opinion by Judge Kelly

OPINION

KELLY, Circuit Judge:

M/V Hanjin Yosu (formerly the Korea Wonis One), a vessel under Korean flag, and its owner, the Hanjin Container Line, Inc. (formerly the Korea Shipping Corp. and hereinafter referred to as Hanjin, Inc.), seek to appeal the district court's judgment in favor of numerous Plaintiffs in an admiralty action.[1] The Plaintiffs are the owners of goods, or their subrogated insurers, damaged during carriage on the Hanjin Yosu. Consolidating their arguments, Defendants appeal on two grounds: (1) Plaintiffs did not have any relationship with

*The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the United States Court of Appeals-Tenth Circuit, sitting by designation.

[1]This dispute was previously before this court on the issue of the applicability of American admiralty law. *See In re Korea Shipping Corp.*, 919 F.2d 601 (9th Cir. 1990).

Defendants sufficient to create a cause of action against Defendants, because Plaintiffs transferred the goods to intermediary non-vessel operating common carriers, who then transferred the goods to Defendants; and (2) even if Defendants are liable, the district court did not correctly apply the statutory liability limitation of $500 per package or customary freight unit. Our jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

The nine Plaintiffs are the owners or subrogated insurers of various goods transported on the Hanjin Yosu in April 1988. Eight of these shippers did not deliver their goods directly to the Hanjin Yosu.[2] Rather, they delivered the goods to several different non-vessel-operating common carriers (NVOCCs), who issued bills of lading to the shippers. The NVOCCs then delivered the goods to the Hanjin Yosu, which issued entirely separate non-negotiable bills of lading to the NVOCCs (the "Hanjin bills of lading"). Some of the transactions involved several NVOCCs transferring the cargo to each other in succession before delivering the cargo to the vessel.

An NVOCC is an intermediary between the shipper of goods and the operator of the vessel that will carry the goods. Generally, an NVOCC combines the goods of various shippers into a single shipment, contracts with a vessel for the transportation of the goods, and delivers the goods to the vessel, usually in a sealed container. *See NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 496 n.8 (1980). NVOCCs perform a function similar to overland freight forwarders, consolidating small shipments from multiple shippers into large, standard-sized reusable containers that can be quickly loaded on and off ships and onto trucks or other types

[2]At oral argument, Defendants conceded that one of the shippers, American Trading dealt directly with Hanjin, Inc. Defendants therefore do not dispute the issue of liability towards that Plaintiff.

of transportation. *See National Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989).

As defined by statute, an NVOCC is a "common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. App. § 1702(17). Conversely, an NVOCC is considered a carrier in its relationship with the shipper of the goods. *National Customs Brokers*, 883 F.2d at 101.

The original shipper of the cargo receives a bill of lading from the NVOCC upon delivery of the cargo to the NVOCC. The NVOCC receives an entirely separate bill of lading from the actual carrier, on which the owner of the cargo may or may not be named. In this case, the cargo owners were not named on the Hanjin bills of lading.

Once loaded on board the Hanjin Yosu, the cargo suffered $466,617 in water damage (before interest and costs) while the vessel was docked in Pusan, Korea. The damaged cargo included goods from several different shippers and NVOCCs, for which nine different bills of lading were given by the Hanjin Yosu. The Hanjin bills of lading were identical in all material respects. In the district court, the parties stipulated to the amount of damages, ownership of the cargo, and the cause of the damage. On appeal, Defendants concede the unseaworthiness of the Hanjin Yosu and their lack of due diligence to maintain the seaworthiness of the vessel.

Discussion

The case comes before the court on stipulated facts, and involves only questions of law, which we review de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Plaintiffs presented two claims to recover the damages to their goods: an in rem action against the vessel and an in personam action

against the shipowner. Defendants responded that Plaintiffs lacked a relationship with Hanjin, Inc. sufficient to support an in personam claim, and that there was no in rem jurisdiction over the Hanjin Yosu.

I. Appellate Jurisdiction over the M/V Hanjin Yosu

After the case had been submitted, we raised the issue of whether the notice of appeal conferred jurisdiction over the vessel Hanjin Yosu. The district court's judgment specifies that liability is in personam against Defendant Hanjin, Inc. *and* in rem against Defendant Hanjin Yosu, except as to the claims of three plaintiffs in which liability is only against Defendant Hanjin, Inc. in personam. The notice of appeal does not specify that the vessel is appealing:

> COMES NOW Hanjin Container Lines, Ltd. and Korea Shipping Corporation and appeal from the judgment for $466,617.97 principal and $140,575.65 interest in favor of plaintiffs on March 23, 1992. . . .

Fed. R. App. P. 3(c) requires that "[t]he notice of appeal shall specify the party or parties taking the appeal." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Supreme Court held that the failure to name a party taking an appeal was jurisdictional. *Id.* at 314. The purpose of a specific designation is to provide notice to the court and to the opposing parties as to the identity of the appellant or appellants. *Id.* at 318. This enables appellees and the court to determine whether "a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions." *Id.*

[1] Although the vessel's name appears in the caption of the notice of appeal along with other Defendants, the caption cannot be read as a designation of the vessel when the text of the notice of appeal designates specific Defendants as appellants and does not include the Defendant vessel. *See National*

Ctr. for Immigrants' Rights v. INS, 892 F.2d 814, 816-17 (9th Cir. 1989) (recognizing that it is possible to describe fewer than the entire group of potential appellants); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988). *See also United States v. Tucson Mechanical Contracting, Inc.*, 921 F.2d 911, 913-914 (9th Cir. 1990). Defendant Hanjin, Inc. argues that it is appealing in two capacities—as defendant and as a claimant of the vessel, and it was unnecessary to designate either capacity in the notice of appeal. Defendant asserts that "[t]he only basis on which this Court could invoke *Torres* for the proposition that Hanjin Yosu had to be named in the appeal is if it determines that the vessel had an independent legal existence and a separate set of liabilities."

We are reluctant to collapse the distinction between the vessel and its owner in these circumstances. Generally, a vessel is viewed as a juristic person, responsible in rem for the acts and omissions of her personnel, separate and distinct from her owner. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945); *The Barnstable*, 181 U.S. 464, 467 (1901). Although the legal fiction of vessel apart from owner has not been applied when it would frustrate Congressional purpose limiting liability, *see Consumers Import Co. v. Kabushiki Kaisha*, 320 U.S. 249, 252-53 (1943); *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 502-04 (1886), or providing a convenient forum, *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23-25 (1960), plaintiffs often sue owners in personam and vessels in rem, *see Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2073 (1991), urging different legal theories and remedies. *See, e.g., Melwire Trading Co. v. M/V Cape Antibes*, 811 F.2d 1271, 1273 (9th Cir.), *amended on other grounds*, 830 F.2d 1083 (1987); *Churchill v. F/V Fjord*, 892 F.2d 763, 767-772 (9th Cir. 1988) (affirming dismissal of in rem action, but reversing comparative fault allocation against in personam defendants), *cert. denied*, 497 U.S. 1025 (1990). In this case, the district court

appears to have made the distinction both in its reasoning and judgment. On appeal, we are required to examine both.

[2] In rem maritime actions are available " 'only in connection with a maritime lien.' " *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 496 (9th Cir. 1991) (quoting *Melwire Trading Co.*, 811 F.2d at 1273). Congress revised and recodified the laws regarding maritime liens in 1988. *See* 46 U.S.C. §§ 31301-31343. These revisions recognize the continued existence of maritime liens "for damage arising out of a maritime tort." 46 U.S.C. § 31301(5)(B). The owner of a vessel is an interested party, but not a necessary one. *Merchants Nat'l Bank v. Dredge Gen. G.L. Gillespie*, 663 F.2d 1338, 1346 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). "Claims not creating a maritime lien must be pursued *in personam*." *Melwire Trading Co.*, 811 F.2d at 1273 (citation omitted). Although Hanjin, Inc. reminds us that it is the claimant of the vessel and that it has coterminous liability with the vessel, it is not identical to the vessel and we decline to hold that a claimant and the vessel are one in the same for purposes naming the proper parties to an appeal. It is too late in this lawsuit to claim that the vessel was not before the court as a party and did not need to file a proper notice of appeal.

II. Plaintiffs' In Personam Claim Against The Shipowner

Defendant Hanjin, Inc. claims that Plaintiffs lack any relationship with it sufficient to support an in personam claim, arguing that Plaintiffs were neither parties to, nor transferees of, the non-negotiable Hanjin bills of lading.

Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore " 'strictly construed against the carrier.' " *C-Art, Ltd. v. Hong Kong Islands Line America, S.A.*, 940 F.2d 530, 532 (9th Cir. 1991) (quoting *Interocean S.S. Corp. v. New Orleans Cold Storage and Warehouse Co.*, 865 F.2d 699, 703 (5th Cir. 1989)), *cert. denied*, 112 S. Ct. 1762 (1992). "[A]ny ambiguity in the bill of lading must be

construed in favor of the shipper and against the carrier. . . . ." *Institute of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761, 767 (9th Cir. 1989); *cf. Pan Am. World Airways, Inc. v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1177 (9th Cir. 1977).

Plaintiffs argue, and the district court concluded, that they are actual parties to the bills of lading under the definition of "Merchant" in the bills of lading. The relevant provision of the bills of lading states:

> 'Merchant' includes the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading.

The Hanjin bills of lading do not name any individual parties as the Merchant. The bills of lading include blanks for the names of the shipper, the exporter, the consignee, the "notify parties," the forwarding agent references, and the vessel, but no blank for either the Merchant or for the owner of the goods. Thus, the only definition of Merchant included on the bills of lading is the contract definition quoted above. The failure to specifically identify a particular party as Merchant is particularly noteworthy given the fact that the bill of lading goes on to use the term Merchant approximately seventy-seven times.

Defendant claims that the definition of Merchant merely describes the various parties who *could be* Merchants. If the face of the bills of lading had named a particular party or parties as Merchants, we would find this argument persuasive. But because the bills of lading do not name any particular parties as Merchants, we must rely on the contract definition of Merchant on the reverse of the bills of lading.

Careful examination of the fine print of the bills of lading lends further support to the conclusion that the cargo owners were within the contract definition of Merchant. The only

other provision in the bills of lading that mentions specifically the cargo owner provides:

> 27. (Freight and Charges) . . .
> (4) The shipper, consignee, owner of the Goods and holder of this Bill of Lading shall be jointly and severally liable to the Carrier for the payment of all freight, charges and other amounts due the Carrier and for any failure of either or both to perform his or their obligations under the terms of this Bill of Lading and they shall indemnify the Carrier against and hold it harmless from all liability, loss, damages and expense which the Carrier may sustain or incur arising or resulting from any such failure of performance by the Merchant or either of them.

This provision unambiguously provides that the cargo owner has obligations under the bills of lading. The provision anticipates that the various parties defined as Merchants would be jointly and severally liable for freight charges. By defining Merchant broadly, the bills of lading attempt to create a broad range of parties from whom the carrier can seek payment for the shipment.

[3] Reading the entirety of the Hanjin bills of lading demonstrates the owners of the goods are parties to the bills of lading as Merchants and therefore have an in personam claim against Hanjin, Inc. Even were we to view the definition of Merchant as an ambiguous contract term, we would construe this ambiguity against the carrier under the rules of construction applicable to bills of lading.

Defendant next argues that, even if Plaintiffs are considered Merchants, Plaintiffs never took any action demonstrating acceptance of the bills of lading, as is required to become bound by their terms. *See* Aplt. Brief at 30-32. Although the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. §§ 1300-1315, does not contain any statutory requirement for

acceptance, Hanjin, Inc. notes correctly that, like all contracts, the bills of lading require some form of acceptance. *See e.g.*, Cal. Civ. Code § 2176 (acceptance of a domestic bill of lading constitutes assent to its terms under Article 7 of UCC). At the very least, Plaintiffs' initiation of this suit constituted acceptance of the terms of the Hanjin bills of lading. *See* 17A Am. Jur. 2d Contracts § 456 (as a basic rule of contract interpretation, a party may accept a contract by filing suit on the contract).

III. Plaintiffs' In Rem Claim Against The Vessel

The Hanjin Yosu disputes the validity of the in rem cause of action against it. Because the vessel is not a party appellant, we decline to address this point other than to restate our previous holding—the plain language of the Hanjin bills of lading establish that these cargo owners were Merchants under the bills of lading and therefore had a direct contractual relationship with the operators of the Hanjin Yosu. When a cargo owner has a direct contractual relationship with the operator of a vessel, the cargo owner has a lien on the vessel for any injury caused by the operator's lack of due diligence. *See Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 499 (1923); *The Keokuk*, 76 U.S. (9 Wall.) 517, 519 (1869).

IV. The Limitation Of Liability Of $500 Per Package Or Customary Freight Unit

Defendant challenges the district court's application of the statutory limitation of liability. COGSA limits the liability of carriers for cargo damaged while in transit to the United States:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . , or in case

> of goods not shipped in packages, per customary freight unit, ...

COGSA § 4(5), codified at 46 U.S.C. § 1304(5). The $500 limitation is not absolute, since shippers must be given the opportunity to declare a higher value of their shipments, and create a higher limitation of liability. *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 808-09 (9th Cir. 1982). Defining "package" under § 4(5) is a question of statutory construction, reviewed de novo. *Van Der Salm Bulb Farms, Inc. v. Hapag Lloyd, AG*, 818 F.2d 699, 701 (9th Cir. 1987).

Defendant's argument centers around the fact that an NVOCC generally does not deliver any packages to the vessel, but instead delivers a sealed container to the vessel. According to the Defendant, that container should be considered the package or customary freight unit to which the $500 limitation applies. Defendant places great weight on the fact that its rate agreements with the NVOCC are determined by the number of containers, not by the number of packages within the containers.

[4] However, the plain language of the bills of lading indicate that the carrier understood that it was shipping packages, and not containers. Under "NO. OF PKGS. OR CONTAINERS," the Hanjin bills of lading list the number of packages within each container delivered to the Hanjin Yosu. By listing the number of packages and containers, the shipper availed itself of the opportunity to clarify the liability limits. *See Universal Leaf Tobacco Co. v. Companhia De Navegacao Maritima Netumar*, 993 F.2d 414, 416-17 (4th Cir. 1993) (courts will not consider a container to be a COGSA package if bill of lading discloses number of packages within container); *Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636, 639-43 (2nd Cir. 1991).

We also reject the carrier's argument that the Hanjin bills of lading define package for the purpose of the limitation of liability. The Hanjin bills of lading provide:

> 29. Limitation of Liability
> (2) . . . (ii) where the cargo has been either packed into container(s) or utilized into similar article(s) of transport by or on the behalf of the Merchant, it is expressly agreed that the number of such container(s) or similar article(s) of transport shown on the face hereof shall be considered the number of the package(s) or unit(s) for the purpose of the application of the limitation of liability provided for herein.

[5] COGSA § 3(8) provides that any contract agreement lessening the statutory liability of the carrier is null and void. 46 U.S.C. § 1303(8) The contract definition of package is neither reasonable nor consistent with the language and purpose of the statute. Listing the number of packages within each container determined the number of packages for the purpose of the limitation of liability when the NVOCCs delivered these sealed containers to the carrier. *See Universal Leaf Tobacco*, 993 F.2d at 416-17 (rejecting similar contract provision); *Shinko Boeki Co. v. S.S. "Pioneer Moon"*, 507 F.2d 342, 344-45 (2d Cir. 1974) (rejecting contract definition of "packages" as applied to bulk shipment of liquid latex); *Matsushita Electric Corp. v. S.S. Aegis Spirit*, 414 F. Supp. 894, 905 (W.D. Wash. 1976) ("If carriers alone, or even carriers and shippers together, are allowed to christen something a 'package' which distorts or belies the plain meaning of this word . . . , then the liability floor becomes illusory and negotiable"); *Cia. Panamena de Seguros, S.A. v. Prudential Lines, Inc.*, 416 F. Supp. 641, 643 (D. C.Z. 1976) (rejecting contract definition of container as package).

V. The Failure of the District Court to Make Written Findings of Fact and Conclusions of Law

Defendant claims that the district court failed to make findings of fact and conclusions of law as required by Fed. R. Civ. P. 52. Defendant first raises this issue as a grounds for appeal in its reply brief, although mention is made of it in the recita-

tion of facts contained in the opening brief. Failure to raise the issue in the opening brief waived that issue on appeal. *See Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 436 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993).

AFFIRMED.

APPENDIX B

STATUTES INVOLVED

46 U.S.C. Appx. § 1304(5), part of the Carriage of Goods by Sea Act:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> "By agreement between the carrier, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.
>
> "Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

46 U.S.C. Appx. § 1702(17), part of the Shipping Act of 1984:

> " 'non-vessel-operating common carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."

49 U.S.C. § 112, part of the Pomerene Bills of Lading Act:

> "A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.
>
> "Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.
>
> "A carrier has not received notification within the meaning of this section unless

an officer or agent of the carrier, the actual or apparent scope of whose duties include action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods."